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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 276

HOUSTON OIL COMPANY OF TEXAS, *Petitioner*,

v.

AMERICAN REPUBLICS CORPORATION, *Respondent*

ANSWER OF RESPONDENT, AMERICAN REPUBLICS CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF PETITIONER, HOUSTON OIL COMPANY OF TEXAS

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TOPICAL INDEX

	PAGE
STATEMENT OF THE CASE	1-9
ARGUMENT	9-31
(a) Parol inadmissible, whereby construction suit conveyance obligatory on face to convey full half mineral interest stipulated	9-17
(b) Petitioner estopped to deny effective conveyance full one-half interest:	
1. Suit instruments so purport, and	
2. Because of recitals of full ownership in suit instruments	17-24
(c) "Exception" or "reservation" by Petitioner of half interest not of equal dignity with Respondent's conveyance for	
1. Most liberal construction required in favor of Respondent as Grantee, and	
2. "Exception" or "reservation" not out of half conveyed Respondent, but merely identified Petitioner's claim to other half not sold	24-30
(d) Judgment of Circuit Court of Appeals under Declaratory Judgment Act sufficient	30-31
CONCLUSION	31

AUTHORITIES

Anderson v. Casey-Swasey, 120 S.W. 914, reversed on other grounds, 129 S.W. 349	23
Anderson & Kerr Drilling Co. v. Bruhlmeyer (1940 Sup.), 134 Tex. 574, 136 S.W. (2d) 800	10, 15
Associated Oil Co. v. Hart (1925, Com. App.), 277 S.W. 1043	28
Baldwin v. Drew (Com. App., opinion adopted by Sup. Court), 244 S.W. 987	16
Benskin v. Barksdale (Com. App.), 246 S.W. 360	16
Bolton v. Dyck Oil Co. (Tex. Civ. App.), 114 S.W. (2d) 299	25
Brinkman v. Rich (Dallas, writ refused), 19 S.W. (2d) 808	22

	PAGE
Brown v. Wiley (1857), 61 U.S. 442, 20 How. 442, 15 L. Ed. 965	11
Cartwright v. Trueblood (Sup.), 90 Tex. 538, 39 S.W. 931	25
Clemmens v. Kennedy (1934, Texarkana—writ refused by Sup. Court of Texas), 68 S.W. (2d) 321	17
Collier v. Carraway (1940, Beaumont—writ of error refused by Sup. Court of Texas), 140 S.W. (2d) 910	28
Cook v. Smith, 107 Tex. 119, 174 S.W. 1094	14
Cope v. Blount, 99 Tex. 431, 90 S.W. 868	22
Corzine's Heirs v. Williams, 85 Tex. 499, 22 S.W. 399	22
Curdy v. Stafford (Sup.), 88 Tex. 120, 30 S.W. 551	16, 25
Davis v. Davis (1943, Com. App., opinion adopted by the Supreme Court), 175 S.W. (2d) 266	10
Davis v. George (1911, Sup.), 104 Tex. 106, 134 S.W. 326	10, 11
Donnell v. Otts (1921, Ft. Worth—no writ), 230 S.W. 864	28
Duhig v. Peavy-Moore, 135 Tex. 503	23
Elliott v. Langham (1933, Waco—no writ), 60 S.W. (2d) 287	19
Fred v. Myers, 113 S.W. 592, affirmed 119 S.W. 1142	23
Garza v. De Montalvo (1949 Sup.), 217 S.W. (2d) 988	10, 12
Gorham v. Settegast (W. E. dismissed by Sup. Court of Texas), 98 S.W. 665	16
Graham's Estate v. Stewart (1929, Ft. Worth, writ of error refused by Sup. Court of Texas), 15 S.W. (2d) 72	15, 16, 25
Greene v. White (1941, Sup.), 137 Tex. 351, 153 S.W. (2d) 575	18, 29
Havard v. Smith (1929, Beaumont, writ of error refused by Sup. Court of Texas), 13 S.W. (2d) 743	18, 19, 21
Heffron v. Pollard (1889, Sup.), 73 Tex. 96, 11 S.W. 165	11
Henry v. Phillips (1912, Sup.), 105 Tex. 459, 151 S.W. 533	16
Houston Oil Co. v. Village Mills (Com. App.), 241 S.W. 122	23
Humble Oil & Refining Co. v. Parish (1940, Texarkana, writ of error dismissed by Sup. Court of Texas with notation judgment correct), 146 S.W. (2d) 1045	11
Jones v. Sun Oil Co. (1937, Texarkana—writ of error refused by Texas Sup. Court), 110 S.W. (2d) 80	28
Kaplan v. American Cotton Oil Co. (5 C.C.A. 1926), 12 Fed. (2d) 969	11
Kimbrough v. Hamilton, 28 Tex. 500	18
King v. First Nat. Bank (1946, Sup.), 144 Tex. 583, 192 S.W. (2d) 260	17
Kynerd v. Hulen (1925, 5 C.C.A.), 5 Fed. (2d) 160, certiorari denied, 46 Sup. Court 22, 69 U.S. 560, 70 L. Ed. 411	11, 25
Lewis v. East Texas Finance Co. (1941, Sup.), 136 Tex. 149, 146 S.W. (2d) 977	10
Lindsey v. Freeman, 83 Tex. 259, 18 S.W. 727	22, 23
Maupin v. Chaney, 139 Tex. 426, 163 S.W. (2d) 380	13
Millican v. McNeill (Sup. Court), 102 Tex. 189, 114 S.W. 106	22
Moore v. City of Waco (1892), 85 Tex. 206, 20 S.W. 61	26

PAGE

McKee v. Stewart (Sup.), 139 Tex. 261, 62 S.W. (2d) 948 .. 16
McMann Oil & Gas Co. (Com. App.), 11 S.W. (2d) 778 27
Parker v. Campbell, 21 Tex. 763 18
Remington-Rand v. Sugarland Industries (1941, Sup.), 137 Tex. 409, 153 S.W. (2d) 477 15
Richardson v. Hart (1945, Sup.), 143 Tex. 392, 185 S.W. (2d) 563 17
Richardson v. Pavell, 83 Tex. 588, 19 S.W. 262 23
Shell Pet. Corp. v. Ward, 100 Fed. (2d) 778 16
Shugart v. Shugart, 233 S.W. 303, 306, affirmed (Com. App.), 248 S.W. 328 26
Simonds v. Stanolind Oil & Gas Co. (1938, Sup.), 134 Tex. 332, 114 S.W. (2d) 226 18
Smith v. Sorrelle, 126 Tex. 353, 85 S.W. (2d) 703 13
Soell v. Hadden, 85 Tex. 182, 19 S.W. 1087 16
South Florida Lumber Mills v. Breuchaud (5 C.C.A., 1931), 51 Fed. (2d) 490; certiorari denied, 52 S. Ct. 37, 284 U.S. 659, 76 L. Ed. 558 11
Spell v. Hanes (1940, Texarkana, writ of error dismissed by Supreme Court with notation judgment correct), 139 S.W. (2d) 229 ..... 17, 25
Summit Coal Company v. Southern Cotton Oil Co. (1929, 5 C.C.A.), 24 Fed. (2d) 48 11
Sun Oil Co. v. Smith (1938—Texarkana, writ of error dismissed by Supreme Court of Texas), 113 S.W. (2d) 683 11
Texas Creosoting Co. v. Hartburg Lumber Co. (Com. App.), 12 S.W. (2d) 169, rehearing denied 16 S.W. (2d) 255 25
Thomas v. Southwestern Settlement & Development Co., 132 Tex. 413, 123 S.W. (2d) 290 ..... 2, 5, 9, 19, 21, 30
Vogel v. Allen (1929, Com. App., opinion adopted by Sup. Court of Texas), 13 S.W. (2d) 340 11
Waco Bridge Co. v. City of Waco (1892), 85 Tex. 320, 20 S.W. 137 29
Wise v. Haymes (1937, Texarkana—no writ), 103 S.W. (2d) 477 19

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ANSWER OF RESPONDENT AMERICAN REPUBLICS CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF PETITIONER, HOUSTON OIL COMPANY OF TEXAS

Statement of the Case

Respondent, being unable to accept the statement of case made by Petitioner, makes the following statement:

Petitioner, a Texas Corporation, as plaintiff, sued Respondent, a Delaware Corporation, as defendant, for a declaratory judgment on the extent of the mineral title conveyed by two instruments called "conveyance" (R. Vol. I, p. 45), and "operating contract and conveyance" (R. Vol. I, p. 62), contemporaneously executed by Petitioner and Southwestern Settlement & Development Company (not incorporated), a trust estate, to Republic Production Company, Respond-

ent's predecessor in estate (as to minerals under lands in Texas), and to Federal Petroleum Company (as to minerals under lands in Louisiana, not involved herein), each dated November 15, 1916, and for a judgment for one-half of all moneys and royalties Petitioner paid to settle a title suit styled Thomas v. Southwestern Settlement & Development Company (R. Vol. I, p. 1-24).

Trial to court, without a jury, was had, by permission (R. Vol. I, p. 153-154), on Petitioner's trial amendment (R. Vol. I, p. 1-24), and Respondent's original answer and its answer to such trial amendment (R. Vol. I, p. 24-105, 106-108). The conveyance was copied verbatim in the forepart of the operating agreement. The conveyance and the operating agreement, hereafter called "Suit instruments", contained the following recitals respecting ownership:

> "Whereas, the grantor has heretofore been the owner of a large acreage of lands in the States of Texas and Louisiana (sic, 790,279 acres) and
>
> "Whereas, prior to August 4, 1916, the grantor made sale of some of the lands above mentioned (relatively small in total quantity) * * * but * * * expressly reserving minerals in and under the land so sold, and with the right of making sale and disposition of such minerals; and
>
> "Whereas, by deed dated August 4, 1916, hereby referred to and made a part hereof, the said grantor sold to the Trust Estate above mentioned, *all* the lands at that time *owned* by it in the State of Texas and Louisiana, but in *said deed expressly reserving all of the oil and gas in and under such lands*, with perpetual rights of ingress and egress * * *; and,
>
> "*Whereas, grantor and the Trust Estate are the owners*

of the mineral rights in a large amount of land situated in the State of Texas, the fee in which they never owned * * * ; and,

"Whereas, grantor and the Trust Estate *are the owners of mineral rights* in certain lands the fee in which (they) once owned, but in selling which *the mineral rights were reserved;* and

"Whereas, the parties of the First Part, collectively but severally as aforesaid, *now being sole owners of all the oil and gas and all other minerals in and under all of such lands* * * * propose now to convey to the grantees herein, severally as hereinafter set forth, *a full undivided one-half interest in and to all of the oil, gas and mineral rights,* whether metallic or non-metallic, in the manner and under the terms as hereinafter set forth, thereby making or seeking to make more valuable the other one-half of all such not thus sold, but reserved." (R. Vol. I, pp. 46-48, 62-65, Foot-note 2 opinion of Circuit Court of Appeals, Vol. III, p. 1525-1526.) (Italics ours.)

"Do hereby grant, bargain, sell and convey a FULL UNDIVIDED ONE-HALF INTEREST IN AND TO ALL OF THE OIL AND GAS AND MINERAL RIGHTS, WHETHER METALLIC OR NON-METALLIC, IN AND UNDER ANY AND ALL LANDS NOW OWNED BY THEM, OR EITHER OF THEM (expressly and only excepting lands in Navarro County, Texas), in the State of Texas and in the State of Louisiana, particularly including (without excluding others not specifically described) all those certain tracts of land which are more particularly described in a Decree entered by the Circuit Court of the United States for the Southern District of Texas, at Houston, in cause No. 54, Equity, entitled 'Maryland Trust Company, Trustee, Complainant, v. Kirby Lumber Company and Houston Oil Company of Texas, Defendants,'

dated the 28th of July, 1908, to which reference is hereby made, and also to the record of said Decree in the public records of Texas and Louisiana, as follows:

(Here follows listing of recording data in various counties in Texas * * *)

"and also any and all oil, gas, and mineral rights, whether metallic or non-metallic, now owned by the said Grantor or Trust Estate in any lands in the State of Texas the fee in which they never owned, save and except in the County of Navarro, State of Texas; and also any and all oil, gas, and mineral rights, whether metallic or non-metallic, now owned by said Grantor or Trust Estate in lands in the State of Texas the fee in which the Grantor or Trust Estate once owned but in the sale of which the mineral rights were reserved, save and except the lands in the County of Navarro, State of Texas." (R. Vol. I, pp. 49-51, 65-67.)

Consideration for execution of the suit instruments was Five Hundred Thousand Dollars ($500,000.00), of which half was paid Petitioner's creditor-mortgagee, Maryland Trust Company, Trustee, and the other half expended in development operations (R. Vol. I, p. 165, 169, 192-365).

By trial amendment, Petitioner contended this language in the granting clauses of the two suit instruments:

" * * * do hereby grant, bargain, sell and convey a FULL UNDIVIDED ONE-HALF INTEREST IN AND TO ALL OF THE OIL AND GAS AND MINERAL RIGHTS, WHETHER METALLIC OR NON-METALLIC, IN AND UNDER ANY AND ALL LANDS NOW OWNED BY THEM OR EITHER OF THEM (expressly and only excepting lands in Navarro County, Texas), in the State of Texas and in the state of Louisiana, particularly including (without excluding others not specifically described) all of those certain tracts of land which are more particularly described in a Decree * * * "

permitted, and the Trial Court, over Respondent's objection, received, parol evidence of the contended intent of the parties and evidence of claimed construction by the parties in support of its contention that all parties intended the language should mean:

> Do hereby grant, bargain, sell and convey an undivided one-half interest in *ONLY* such oil, gas, and other minerals *WHICH MAY HAVE BEEN OWNED* BY THEM, ON NOVEMBER 15, 1916, the date of such instruments. (Italics ours.)

Respondent, by answer and objection to admissibility, contended the suit instruments clearly and effectively conveyed a full undivided one-half interest in the oil, gas, and minerals in and under the lands described therein; that such instruments, being plain and unambiguous, parol evidence was inadmissible, either to prove intent or practical construction by the parties; that the suit instruments, being plain and unambiguous, the Court was without power to do aught save to apply said instruments according to their tenor and effect; that the contention of plaintiff would alter, amend, modify, reform, and re-write the instruments whereas there was no pleading or proof of fraud, accident, or mistake to authorize it, nor any ambiguity permitting such parol for the device of "construction"; that Petitioner was estopped by recitals in the suit instruments, and other instruments, and holdings it procured from the Supreme Court of Texas in the case of Thomas v. Southwestern Settlement & Development Co., et al., as to the effect, both quantitatively and qualitatively, of the title conveyed thereby. Respondent also claimed that the holding and finding of the Supreme Court of Texas was binding upon Petitioner and the Federal Courts; and further, that the parol

evidence, permitted by the Trial Court over objection, apart from its inadmissibility, would not, as a matter of law, permit or be sufficient to require a holding and adjudication upon the basis of intent or construction as contended for by Petitioner.

The Trial Court, though concluding the suit instruments to be unambiguous (R. Vol. I, p. 125), adopted Petitioner's contentions and Findings of Fact and Conclusions of Law (R. Vol. I, pp. 108-125), and gave petitioner judgment thereon (R. Vol. I, pp. 125-131), and for Thirty-Nine Thousand Three Hundred Fifty-Five and 95/100 Dollars ($39,355.95) as one-half the cost of such settlement, and purported to construe the suit instruments to convey an undivided one-half interest in *only* such or *whatever title* Petitioner and its co-grantor may have owned at the date of the conveyance. Amendment of such findings, conclusions, and judgment were denied (R. Vol. I, pp. 131-142), Respondent appealed and filed supersedeas bond (R. Vol. I, pp. 143, 144-146).

The Circuit Court of Appeals reversed and rendered, holding:

1. The suit instruments, being unambiguous, their meaning "can and must be determined" from them, whereby the "vast mass of evidence received in aid of their construction was improperly admitted." (R. Vol. III, p. 1529.)

2. The face of the suit instruments showed the Trial Judge wrong in concluding

(a) Respondent took, not, as the deed declared, a full undivided one-half mineral interest which Petitioner in the deed declared it owned, but merely a one-half interest with Petitioner "in its chance for title";

(b) That the so-called reservation of the other one-half must be construed as of equal force and dignity with the granting words;

(c) That Petitioner was not estopped by its deed to assert that it did not (as it declared it did) convey to Respondent a full undivided one-half interest; and

(d) That notwithstanding its declaration of ownership and covenant of warranty, Petitioner had the right now to assert in its favor a mineral title "which will effect a diminution of the full one-half interest it conveyed and warranted * * * ." (R. Vol. III, pp. 1530-1531.)

3. That if all of the parol evidence offered and admitted "be considered as admissible * * *, and looked to," it did not support the findings of the Trial Court that the parties had placed a practical construction on the suit instruments inconsistent with Respondent's, consistent with Petitioner's contentions. (R. Vol. III, p. 1531). (This exposes statement of non-consideration, Br. middle p. 41.)

4. That the provisions in the operating contract based upon the theory that Petitioner was the full owner and would thus have a half interest left after conveying a half interest to Respondent "was induced by and based on grantor's (Petitioner's) positive declaration in the deed that it owned the full title" which declaration Petitioner was estopped to deny (R. Vol. I, p. 1531).

5. That coöperation by Respondent with Petitioner in defending suits filed against the common property was not inconsistent with its legal position or rights upon the conveyance, were beneficial to petitioner, and did not amount to a waiver or conscious relinquishment of right by Respondent (R. Vol. III, 1531-1532).

6. All negotiations prior to execution were merged and integrated in the suit instruments, and furnished no basis for relief to Petitioner, there being no claim for reformation (R. Vol. III, p. 1532).

7. Petitioner by asserting in its deed full ownership of all minerals and then conveying, with covenant of special warranty, a full undivided one-half in and to them "absolutely and completely estopped itself by the deed from ever claiming to the contrary of its declaration that it did own the whole, and could and would sell the full undivided one-half", and from ever claiming against its warranty a title in diminution of the one-half thus conveyed (R. Vol. III, p. 1532).

That under the applicable laws and decisions of Texas the estoppel existed irrespective of the presence or absence of a warranty of whatever quality (R. Vol. III, p. 1532-1535).

8. That if the grantor and grantee had really intended what Petitioner now claims they intended, the lawyers who prepared the instruments and who knew Texas land law intimately would have drawn quite different instruments, omitting assurances of ownership, and limited to a quit claim of chance of title; that the overwhelming demonstration in the record of the success of Petitioner in maintaining the integrity of its titles was indicative not only of the belief in its declaration of ownership, but its willingness to convey the first one-half to Respondent, who in view of such matters was willing to take a special rather than a general warranty, so that Petitioner was held estopped from now asserting a claim to the contrary (R. Vol. III, pp. 1535-1536).

The Circuit Court of Appeals for the Fifth Circuit reversed and rendered the judgment of the Trial Court on March 30, 1949, the opinion of which is reported in 173

Fed. (2d) 728 (R. Vol. III, pp. 1523-1537), one judge dissenting without dissenting opinion.

Petition for rehearing was denied May 23, 1949 (R. Vol. III, p. 1555). Petition for certiorari was filed in the office of the Clerk of the Supreme Court of the United States on August 18, 1949, and notice thereof served upon counsel for Respondent on August 28, 1949.

Argument

Examination of the petition and supporting brief shows the points raised by Petitioner fall into four topical headings, which will be used as the basis for this discussion.

The petition and supporting brief show clearly that this cause does not involve a Federal question, a question of Federal law, or a question of public importance, but that it is simply a private controversy between private parties, in which the Honorable Circuit Court of Appeals applied well settled doctrines and decisions by the Court of Last Resort in Texas.

The suit instruments, being unambiguous, parol evidence was inadmissible and incompetent, whereby construction from the face of the suit instruments was obligatory to effect conveyance of a full one-half mineral interest to Respondent stipulated by their terms.

(Answering Specifications of Error 1, 3, 4, 5, 6, pages 13, 14, Br., First, Second, and Third Points, pages 15, 26, Br.)

Petitioner sought declaratory judgment on extent of title conveyed by suit instruments, and money judgment for monies paid to settle a title suit styled THOMAS v. SOUTHWESTERN SETTLEMENT & DEVELOPMENT COMPANY, but did not plead fraud, accident, or mistake, nor seek reforma-

tion (R. Vol. I, pp. 1-24). Non-ambiguity of the suit instruments stands admitted (Br. pp. 33-34, R. Vol. I, pp. 17-18, Par. XII). Both courts below held the suit deed unambiguous (R. Vol. I, p. 125, Vol. III, p. 1529).

Rules of construction of deeds are to be resorted to only when the language used renders the intention uncertain—for rules of construction are merely artificial aids to primary inquiry of the intent of the parties. If intent be plainly and unambiguously expressed on the deed's face, parol evidence in no possibility could be admissible, because it could not explain, or assist, or aid, in any manner, intent declared by plain and clear statement. The granting clause (quoted pages 3-4 hereof) by its clarity leaves no doubt that one-half was conveyed.

The rule is fixed which denies admissibility of parol to identify intent, or to change the character or extent of the land or estate conveyed, or to show contemporaneous circumstances surrounding the transaction and execution of the conveyance, where the deed is unambiguous, because then, intent must be found from the words employed. The reason undergirding the rule is: There being no ambiguity, there is no uncertainty; there being no uncertainty, no necessity for parol.

Davis v. Davis (1943, Com. App. opinion adopted by the Supreme Court), 175 S.W. (2d) 266;

Lewis v. East Texas Finance Co. (1941, Sup.), 136 Tex. 149, 146 S.W. (2d) 977;

Garza v. De Montalvo (1949, Sup.), 217 S.W. (2d) 988;

Anderson & Kerr v. Bruhlmeyer (1940, Sup.), 134 Tex. 574, 136 S.W. (2d) 800;

Davis v. George (1911, Sup.), 104 Tex. 106, 134 S.W. 326;

Vogel v. Allen (1929, Com. App. opinion adopted by Sup. Court of Texas), 13 S.W. (2d) 340;

Heffron v. Pollard (1889, Sup.), 73 Tex. 96, 11 S.W. 165;
(Opinion by Justice Gaines, one of Texas's mightiest).

Sun Oil Co. v. Smith (1938, Texarkana, writ of error dismissed by Supreme Court of Texas), 113 S.W. (2d) 683;

Humble Oil & Refining Co. v. Parish (1940, Texarkana, writ of error dismissed Sup. Court, Texas, with notation judgment correct), 146 S.W. (2d) 1045.

The Federal Courts approve the Texas rule:

Kynerd v. Hulen (1925, 5 C.C.A.), 5 Fed. (2d) 160, certiorari denied, 46 S. Ct. 22, 69 U.S. 560, 70 L. Ed. 411;
(Holding that since it is "the purpose of the granting clause of a deed * * * to define and designate the estate conveyed in case of conflict, it prevails over other clauses", after which it held demurrers to allegations based upon proof by parol were correctly sustained).

Brown v. Wiley (1857), 61 U.S. 442, 20 How. 442, 15 L. Ed. 965;

Summit Coal Company v. Southern Cotton Oil Co. (1928, 5 C.C.A.), 24 Fed. (2d) 48;

South Florida Lumber Mills v. Breuchaud (5 C.C.A. 1931), 51 Fed. (2d) 490; certiorari denied, 52 S. Ct. 37, 284 U.S. 659, 76 L. Ed. 558;

Kaplan v. American Cotton Oil Co. (5 C.C.A. 1926), 12 Fed. (2d) 969.

The Supreme Court, in DAVIS v. GEORGE, supra, gives the answer to this law suit:

> *" * * * but when the question is, what land did the deed convey, its legal effect between the parties is the very best invoked, and it must, therefore, answer the inquiry by its own terms, since no land was conveyed except by it and it conveys no land except that which by its terms it undertook to convey. Parol evidence, whether brought by parties or strangers, cannot make it convey land which it did not purport to convey, nor prevent it from conveying that which it does clearly purport to convey."* (Italics ours.)

Eminently just, and thus well planted in the decisions of the Texas Supreme Court over a long span of years, was the holding below that the suit instruments, being unambiguous, parol evidence was inadmissible and incompetent; as well as the holding that the suit instruments' meaning can and must be determined from a reading of them.

Petitioner obtains no assistance from GARZA v. DE MONTALVO, supra (Br. p. 40). The Supreme Court there holds:

> "We know of no rule of construction which would permit the unambiguous meaning of the language of the agreement to be departed from because later developments prove the agreement to be more advantageous to some of the parties than to others." (217 S.W. (2d) 993.)

and, (p. 994) holds that the agreement, being unambiguous, parol evidence was not admissible.

The position is that the phrase, "in and under any and all lands now owned by them or either of them in the State of Texas", is not descriptive matter, but is a qualification upon the right. The architecture of the language demonstrates this to be untenable. The quoted phrase necessarily is the description of the lands, by which was intended to be furnished the key from which they could be identified. This is confirmed by the following language:

"particularly including (without excluding others not specifically described) all those certain tracts of land which are more particularly described in a Decree" etc.

In Texas, sufficiency of description must be certain or must contain, upon the face of the conveyance, a key or reference to some other source or origin, or instrument, or deed, or parol, which can be followed to produce certainty in identifying that conveyed.

Maupin v. Chaney, 139 Tex. 426, 163 S.W. (2d) 380;
Smith v. Sorrelle, 126 Tex. 353, 85 S.W. (2d) 703.

The suit instruments in the granting clause and description contain four keys of identification as follows:

(1) "Any and all lands now owned by them, or either of them (except in Navarro County, Texas), in the State of Texas;

(2) As a part of those lands but "without excluding others not specifically described, all of those certain tracts of land which are more particularly described in a Decree * * * in Cause No. 54 Equity" followed by the recording data of such Decree in a number of Texas counties;

(3) "Mineral rights * * * now owned by the said Grantor or Trust Estate in any lands in the State of Texas the fee in which they never owned" (except Navarro County, Texas);

(4) Minerals "now owned by said Grantor or Trust Estate in lands * * * the fee in which the Grantor or Trust Estate once owned but in the sale of which the mineral rights were reserved" (except Navarro County, Texas.) (R. Vol. I, Deed pp. 49, 51; Operating Agreement, Vol. I, pp. 165, 167).

Conclusion VII (R. Vol. I, p. 121) of the trial court

demonstrates the necessity to interpolate language in the suit instruments to achieve the result contended for by Petitioner, in the language "conveyed (to Respondent) * * * an undivided one-half (½) interest in and to *only such* oil and gas rights *as were owned* by Houston Oil Company of Texas * * *, *at the time the instrument was executed.*" Thus, the trial court had to alter, amend, reform, and add to the language of the conveyance—in fact made an involuntary conveyance and contract for Respondent—wholly contrary, and diametrically opposed to the suit deed. Petitioner's prayer for "construction" was, in truth, an effort to alter, change, and rewrite the instrument.

The Supreme Court of Texas in COOK v. SMITH, 107 Tex. 119, 174 S.W. 1094, expressly condemned the interpolation of the same word "only" in a deed description, by which device escape was sought from language of general intent which the defendants in error in that case recognized as destructive of their position. Such change in the form of expression was repudiated, and the integrity of the deed language exonerated.

It is not to be presumed that the original parties being represented, in preparation of the suit instruments, by lawyers of the brilliance and competence of Judge Kennerly and Judge Autrey would have omitted to have placed a restrictive word "only" or "only such oil and gas rights as were owned by Petitioner at the date of execution of the instruments" if such had, at any stage of the matter, been the agreement of the parties. Such an interpolation would destroy the suit deed as a conveyance, and commute it into a mere assignment of a chance at title. Petitioner urges that there was much litigation and claims Respondent was told of it. Judge Kennerly testified that while the claimants "were legion", Petitioner never ceased to claim (R. Vol. II, p. 628, 629). On the Arriola League, in which the Thomas suit

pended, there had been all manner of litigation with different sets of people claiming to be the true Arriola heirs (R. Vol. II, p. 628-629).

In the light of all that litigation and of the character of the claims asserted against its title, Petitioner in executing the suit instruments, if in truth it intended they contain the restrictive words and phrases "only", and "only such as were owned by Houston Oil Company at the date of the execution" would have seen to it the suit instruments contained the language. It never had such intent. It asserted ownership, litigated upon the contention, executed numerous conveyances upon the contention, and then executed the suit instruments upon the belief and claim that it owned the full title. So claiming and believing, the intent sought to be declared by this litigation has no room for existence. The Circuit Court of Appeals was right in so holding (R. Vol. III, p. 1535-1536).

The Supreme Court of Texas in ANDERSON & KERR DRILLING CO. v. BRUHLMEYER (1940, Sup.), 134 Tex. 574, 136 S.W. (2d) 800, reaffirmed the rule of long standing that "* * * when the instrument by its terms plainly and clearly discloses the intention of the parties, or is phrased in language not susceptible of more than one interpretation, the intention of the parties is to be ascertained by the court as a matter of law from the language used in the writing without aid from evidence as to the attending circumstances."

Accord:

Remington-Rand v. Sugarland Industries (1941, Sup.), 137 Tex. 409, 153 S.W. (2d) 477;

Graham's Estate v. Stewart (1929, Ft. Worth—writ of error refused by the Supreme Court of Texas), 15 S.W. (2d) 72;

(Holding that while the parol was sufficient to support the jury finding, it was inadmissible and incompetent and the finding of the jury could not be given any effect.)

Henry v. Phillips, (1912, Sup.), 105 Tex. 459, 151 S.W. 533;
(Holding parol incompetent and ineffectual even though admitted without objection.)

Soell v. Hadden, 85 Tex. 182, 19 S.W. 1087;

Benskin v. Barksdale (Com. App.), 246 S.W. 360;

Baldwin v. Drew (Com. App., opinion adopted by the Supreme Court), 244 S.W. 987;

McKee v. Stewart (Sup.), 139 Tex. 261, 62 S.W. (2d) 948.

The language of a deed is that of the grantor, and it should be construed against him.

Curdy v. Stafford (Sup.), 88 Tex. 120, 30 S.W. 551;

Shell Petroleum Corporation v. Ward, 100 Fed. (2d) 778.

Nor can the court under the guise of construction make deeds or contracts for the parties.

Gorham v. Settegast (writ of error dism. by Sup. Ct. of Texas), 98 S.W. 665.

It thus follows that a deed must be construed as passing the largest estate its terms will permit, and that a restrictive clause will be disregarded if it is in conflict with the plain and unambiguous conveying clause.

Graham's Estate v. Stewart (1929, Ft. Worth, writ of error refused, Sup. Ct. of Texas), 15 S.W. (2d) 72.

The courts of Texas have been uniform and positive in repudiating all attempts under the guise of construction or intention to impair and alter the language and legal effect of deeds or to mutate the character and extent of the estate conveyed.

Spell v. Hanes (1940, Texarkana, writ of error dism. by Sup. Court with notation judgment correct), 139 S.W. (2d) 229;

King v. First National Bank (1946) (Sup.), 144 Tex. 583, 192 S.W. (2d) 260;

Clemmens v. Kennedy (1934, Texarkana—writ of error refused by Sup. Ct. of Texas), 68 S.W. (2d) 321;

Richardson v. Hart (1945, Sup.), 143 Tex. 392, 185 S.W. (2d) 563.

In the CLEMMENS CASE, supra, the court held Clemmens (as Petitioner here), mistakenly thought he owned more title than he in truth owned, but held that relief "from the consequences of the mistaken idea simply and of itself, not accompanied by fraud or any inequitable conduct of the grantee" could not be had because, "the court cannot change the contract actually made and truly embodied in the written instrument. Neither can the court make a new contract for the parties."

Unquestionably the suit instruments purported to, and did, convey to Respondent a full, undivided one-half mineral interest. The language of the deed does not permit of any other possibility or conclusion. The Honorable Court of Circuit Appeals, therefore, was eminently correct in so holding.

Petitioner was estopped, at law, to deny the suit instruments were effective to convey a full one-half

interest: (1) Because the suit instruments purported to so convey, and (2) Because Petitioner is concluded by recitals of its ownership contained in the suit instruments.

(Answering Specifications 7, 8, p. 14, Br., Fourth Point, p. 41, Br.)

It is settled beyond peradventure in Texas, that all parties to an instrument, their privies in blood and estate, are conclusively bound by all recitals made in the course of such instruments. The quality of this estoppel has no kinship or relationship whatever to the customary estoppel in pais. He who relies upon such estoppel is not required to show prior knowledge of the recital, reliance upon the recital, or any change of position resulting thereabout. He who seeks to enforce the estoppel, must only show that the party *against* whom enforcement was sought was a party to the instrument containing such recital, or is a privy in blood or estate with one who was a party to such instrument. Such recitals are held primary evidence, matter which need not at any time be otherwise proven, which forms a muniment of title, and which may not be averred against.

Havard v. Smith (1929, Beaumont, writ of error refused by the Supreme Court of Texas), 13 S.W. (2d) 743;

Kimbrough v. Hamilton, 28 Tex. 500;

Parker v. Campbell, 21 Tex. 763;

Greene v. White (1941, Sup.), 137 Tex. 351, 153 S.W. (2d) 575;

Simonds v. Stanolind Oil & Gas Co. (1938 Sup.), 134 Tex. 332, 114 S.W. (2d) 226;

Turner v. Hunt (1938, Com. App., opinion adopted by Sup. Ct. of Texas), 116 S.W. (2d) 688;

Wise v. Haynes (1937, Texarkana—no writ), 103 S.W. (2d) 477;

Elliott v. Langham (1933, Waco—no writ), 60 S.W. (2d) 287.

The doctrine of HAVARD v. SMITH, supra, has been approved by the Fifth Circuit Court of Appeals, see ROBERTS v. CHADWICK (1946), 158 Fed. (2d) 375.

The recitals of ownership set out (see page 2-4 hereof) are strictly within the rule of the cases above listed. The statement (p. 42, Br.) that the opinion below does not set out the recitals is incorrect, as shown by footnote 2, R. Vol. III, p. 1525-1526. By those recitals, Petitioner represented, asserted, and claimed that it was the full owner of all mineral interest. Whether it was or not, or whether it subsequently developed that it was not, or whether (in accordance with the holding of the case of CLEMMENS v. KENNEDY, 68 S.W. (2d) 321, supra), it was mistaken in the belief that it owned, it is by the rule of such cases concluded and bound by such recitals, and being estopped, cannot be heard to deny, to aver against the recitals which are primary evidence and muniments of title.

There are other recitals. In 1932 the Duck heirs (Thomas v. Southwestern Settlement & Development Company) sued Petitioner and Respondent (R. Vol. I, p. 381). In such case in the Supreme Court of Texas, Petitioner, through its attorneys, filed briefs containing the following statements, recitals, and admissions:

"It (the suit deed) conveyed to Republic Production Company an undivided one-half interest in all minerals under such lands including the Arriola League" (R. Vol. III, p. 1417).

"When the Southwestern Settlement & Development Company and Houston Oil Company of Texas conveyed to

the Republic Production Company in November of 1916, the Southwestern Settlement & Development Company parted with a half interest in those minerals other than oil and gas, and the Houston Oil Company of Texas parted with a half interest in the oil and gas." (R. Vol. III, p. 1418.)

"On 8-4-16 (S.F. p. 73-78) the Houston Oil Company of Texas executed a deed to Southwestern Settlement & Development Company conveying, among numerous other tracts of land in Texas and Louisiana, the said 4328 acres of the Arriola League claimed by it but reserving the oil and gas." (R. Vol. III, p. 1419.)

"On 11-15-16 (S.F. p. 78-86) said latter two companies executed a deed to Republic Production Company, conveying an undivided one-half interest in all the minerals underlying the tract here involved and numerous other tracts in Texas." (R. Vol. III, p. 1419.)

"On 11-15-16 Houston Oil Company of Texas and the Trust Estate executed a deed and entered into an operating contract with Republic Production Company and Federal Petroleum Company (S.F. pp. 79-80, et seq.). This deed refers to the deed of the Southwestern Settlement & Development Company, supra, refers to the reservations in it made, and states that the said Houston Oil Company of Texas and Trust Estate collectively, but severally as aforesaid, then being the sole owners of all of the oil, gas, and other minerals on, in and under all such lands, in order to promote and advance the development of the same for the purpose of making the other half more valuable, for a certain sum of money and the further consideration of deferred payments thereinafter mentioned, and the further terms of said instruments, the said grantors conveyed a full, undivided, one-half interest in and to the lands described in the deed from the Houston Oil Company of Texas to the Trust Estate, including 4328 acres of the

Eduardo Arriola League, and numerous other tracts in Texas and Louisiana, the Texas lands being set over to the Republic Production Company and the Louisiana lands to the Federal Petroleum Company" (R. Vol. III, p. 1419-1420).

These briefs were filed in 1935 and 1937. In certifying the question to the Supreme Court of Texas the Beaumont Court of Civil Appeals (132 Tex. 413, 123 S.W. (2d) 290, 292) found and held that the same deed here involved conveyed to Respondent a full undivided one-half interest. Again these recitals are strictly within the boundaries of the estoppel doctrine of HAVARD v. SMITH, supra, and similar cases.

But Petitioner argues it being adjudicated it never owned the 3/35 (Duck heirs') interest, Respondent could only acquire by its deed one-half of the "true" title it then owned. Such position is a non-sequitur. After such loss, Petitioner still had more than sufficient title to protect the integrity of its solemn conveyance to Respondent of a full one-half. The Supreme Court also repudiates the contention in the THOMAS CASE (123 S.W. (2d) 290, at p. 300), by holding that as against the Duck heirs the deeds executed by Petitioner to Respondent and others were not effective to convey the Duck heirs' title, but that as between Petitioner and the grantees of such deed they were effective, which is, of course, indisputably true.

JUDGE SMEDLEY, who wrote the opinion in the THOMAS CASE, also wrote the opinion for the Supreme Court in GREENE v. WHITE, supra. There, Greene conveyed Garrett 133 acres reserving all minerals thereunder (there was no reservation here out of the title conveyed Respondent). Garrett's heirs, relying on the THOMAS CASE, attacked the reservation as ineffectual and inconclusive contending Greene owned no title in the 133

acres to convey. JUDGE SMEDLEY held ownership of title by the Grantor, Greene, was not necessary to the validity of the conveyance or reservation, or its binding effect on the parties; and said there was nothing in the Thomas opinion to intimate Petitioner's reservation in its deed to Southwestern Settlement & Development Company was not effective even though it did not, in truth, own the 3/25ths Duck heirs title (153 S.W. (2d) 585-586). Thus, Petitioner was held not at liberty to assert its deed to Southwestern did less than it purported to do.

It has always been the law in Texas that one who assumes ownership and sells is estopped forever afterward to assert a title adverse to that conveyed.

Lindsey v. Freeman, 83 Tex. 259, 18 S.W. 727;

Corzine's Heirs v. Williams, 85 Tex. 499, 22 S.W. 392;

Cope v. Blount, 99 Tex. 431, 90 S.W. 868;

Brinkman v. Rich (Dallas, writ of error ref.), 19 S.W. (2d) 808;

Millican v. McNeill (Sup. Ct.), 102 Tex. 189, 114 S.W. 106.

It is apparent Petitioners sought to assert the Duck heirs' title adversely to its conveyance to Respondent, and by such adverse assertion to destroy the full title which it declared by the suit instruments it owned and conveyed. This it could not do, being estopped under the ruling of the above cited cases.

The trial court in Fact Finding XV talked about the "limited special warranty" in the suit deed, but that avails Petitioner nothing. If it had not sufficient title to protect and exonerate its conveyance of a one-half interest, basis might have existed for inquiry of the effect of a special

warranty, or whatever warranty the suit instruments had, yet in that event, the title Petitioner acquired from the settlement with the Duck heirs, to the extent necessary to protect its conveyance, would immediately have passed to Respondent, and Petitioner would have been estopped to assert either that it did not pass, or that it had no such title at the time of the conveyance.

Lindsey v. Freeman, 83 Tex. 259, 18 S.W. 727;
(The Supreme Court of Texas here applies the rule, even where the deed contains no warranty at all; see most excellent discussion by the Court below of Lindsey v. Freeman, Corzine's Heirs v. Williams, and Duhig v. Peavy-Moore, 135 Tex. 503. R. Vol. III, p. 1532-1535.)

Houston Oil Company v. Village Mills (Com. App.), 241 S.W. 122;

Duhig v. Peavy-Moore, 135 Tex. 503;

Richardson v. Pavell, 83 Tex. 588, 19 S.W. 262;

Anderson v. Casey-Swasey, 120 S.W. 918, reversed on other grounds, 129 S.W. 349;

Fred v. Myers, 113 S.W. 592, affirmed 119 S.W. 1142.

Even if Respondent knew, which is denied, that Petitioner at the date of delivery of the suit deed owned no character of title or interest in the land conveyed, such knowledge would neither militate against the grantee's right to have his grantor exonerate the conveyance, nor as between the parties destroy, impair, or diminish the estate conferred by the instrument. The grantor, in such instance, simply is under the legal compulsion to obtain title to exonerate his solemn act of conveyance. Knowledge of a grantee, before or after, does not have effect to destroy, reform, or cancel the solemn act of conveyance, voluntarily made by the

grantor. The statute of frauds stipulates a writing and grantor's signature, not unilateral "knowledge" of grantee receiving the deed. The decision of the court below holding petitioner estopped was wholly correct.

The "exception" or "reservation" by Petitioner of a half interest, at law, is not of equal dignity with the conveyance to Respondent for, (1) the conveyance must be most liberally construed in Respondent's favor, as grantee, and the "exception" or "reservation" most strictly construed against Petitioner, as grantor, and, (2) the "exception" or "reservation" does not purport to reserve or except any portion of the full undivided one-half of the minerals conveyed Respondent, but only purports to identify Petitioner's continued assertion of ownership of "the other one-half of all such not thus sold * * * ".

(Answering Specification 2, p. 13 Br., Fourth Point, p. 41, Br.)

Petitioner's contentions that the "reservation" of one-half was of equal dignity with the conveyance of one-half to Respondent, and, that upon designation of units, conveyance was made inter sese of one-half of such unit, irrespective of the title otherwise conveyed or vested by the granting clause (purportedly based upon Paragraph 6 of the operating agreement (R. Vol. I, p. 174) providing for a non-designating party electing not to join the drilling operation to receive a 1/16th royalty interest) which showed that the parties intended one-half of whatever title Petitioner had because 1/16th was one-half of the usual and customary royalty: are wholly without merit. The so-called "reservation" is based upon a statement in course of a recital in the suit deed which, after reciting that Petitioner

owns all of the oil, gas, and other minerals, and proposes to convey to Respondent a full, undivided half interest, further recites as the purpose, "thereby making or seeking to make more valuable the other one-half of all such not thus sold, but reserved." (R. Vol. I, p. 65.)

In cases of irreconciliable conflict between parts of a deed, the granting clause will prevail over all other parts of such deed.

Graham's Estate v. Stewart (1929, Ft. Worth, writ of error refused by S. Ct. of Texas), 15 S.W. (2d) 72;

Cartwright v. Trueblood (Supreme), 90 Tex. 538, 39 S.W. 931;

Kynerd v. Hulen (5 C.C.A., 1925), 5 Fed. (2d) 160, certiorari denied 46 S. Ct. 22, 69 U.S. 560, 70 L. Ed. 411.

A reservation is construed strictly against the grantor, and the deed will be given that meaning which confers the greatest possible estate permitted by the instrument upon the grantee.

Texas Creosoting Co. v. Hartburg Lumber Co. (Com. App.), 12 S.W. (2d) 169, 174, rehearing denied 16 S.W. (2d) 255;

Spell v. Hanes (1940, Texarkana—writ of error dismissed by Sup. Ct. of Texas, notation judgment correct), 139 S.W. (2d) 229;

Bolton v. Dyck Oil Co. (Tex. Civ. App.), 114 S.W. (2d) 299;

Curdy v. Stafford, 88 Tex. 120, 30 S.W. 551.

If a reservation be repugnant to the granting clause, or destroys the subject matter of the conveyance, the reservation is wholly void and ineffectual.

Moore v. City of Waco (1892), 85 Tex. 206, 20 S.W. 61;

Shugart v. Shugart, 233 S.W. 303, 306, affirmed (Com. App.), 248 S.W. 328.

Under the doctrine of these cases it cannot be gainsaid that the so-called "reservation" is not only inferior to the granting clause, but must be construed strictly against Petitioner, and, insofar as the same conflicts with the full, undivided one-half interest conveyed Respondent, is wholly void and ineffectual. It must shrink to such extent necessary to exonerate the full one-half interest conveyed. It could not be of equal dignity.

The "reservation" or "exception" was not "struck down and nullified" as stated (Br. p. 23, 42), the holding was the "reservation" was not of equal dignity with the conveyance (R. Vol. III, p. 1530), and that Petitioner was estopped to assert it against, or in diminution of, the title conveyed Respondent (R. Vol. III, p. 1532).

The internal evidence of Paragraph 6 is sufficient to show the construction placed thereon, is in derogation of the plain and conclusive import of the suit instruments. That is simply a paragraph which this Court judicially knows is customarily included in all operating agreements. It provides that if one party designates a well and the other elects not to join in any of the expenses or risks of the drilling, the drilling party shall have exclusive title to the product of the well and the non-consenting party shall receive, instead of his interest, a one-sixteenth royalty. It then provides:

> "If after giving such notice, the party giving the same shall not within 90 days thereafter commence and actively prosecute operations in compliance therewith, such notice from that time shall be considered as can-

celled and of no more effect than if it had never been given." (R. Vol. I, p. 175.)

Title is not within the purview of Paragraph 6. Title is never disturbed. The only thing provided by that language is the right of participation in the product of a particular well. This flexibility is necessary to permit operation, otherwise one party could refuse to join, and stalemate all operation. That the contention is absurd is shown by the quoted provision. Title cannot vest, terminate, unvest, revest, or reinvest as it would have to under such contention. Title cannot jump, like a flea, from notice to notice, and automatically by 30-day period. Equally conclusive is the holding of the Circuit Court of Appeals sustaining Respondent's contention that the provisions of the operating agreement were induced by the representation Petitioner made in respect of sole ownership, and that Respondent had a right to rely upon such representations and to assume that Petitioner did own the full interest and thus did have a one-half interest left, but the "reservation" is neither a "reservation" nor an "exception."

> "The office of an exception is to take something out of the thing granted that would otherwise pass, and the exception, as an estate, is of a kind with that granted; whereas a reservation carves out of the grant a new thing or estate, and it therein differs from an exception which is ever a part of the thing granted and of a thing in esse at the time * * * Simply illustrated, a grant of Block 5 except Lot 1 is an exception; whereas a grant of Block 5 with a life estate to the grantor is a reservation." McMann Oil & Gas Co. (Com. App.), 41 S.W. (2d) 778.

Petitioner, asserting and reciting ownership of all minerals, conveyed to Respondent one of the halves of the whole. It was left with ownership of the distinct, independent,

and separate other half, not conveyed. The so-called "reserved" half could not be an exception because it took nothing out of the half granted Respondent; nor could it be a reservation because it was never at any time carved out of the half conveyed Respondent. The half not conveyed by Petitioner, was never a part of the half conveyed Respondent.

The Supreme Court of Texas, in the McMANN case, also said:

> " * * * The property excepted or the estate reserved is never included in the grant."

Thus, it logically follows that a reservation is not only not of equal dignity with the grant; but it also indisputably appears that there is no authority for the proposition that this "reservation" can be used to cut down, diminish, annul, and cancel any part of the granting clause of the estate thereby conveyed. In passing, in point (18) in the McMANN opinion, the Court again affirms the rule that parol of conditions and circumstances at the time of execution can only be received where the deed is ambiguous and can never be permitted to produce a construction inconsistent with the words used in the conveyance so as to add to or detract from the instrument.

Accord:

Associated Oil Co. v. Hart (1925, Com. App.), 277 S.W. 1043;

Jones v. Sun Oil Co. (1937, Texarkana—writ of error refused, Tex. Sup. Ct.), 110 S.W. (2d) 80;

Collier v. Carraway (1940, Beaumont—writ of error refused by Sup. Ct. of Texas), 140 S.W. (2d) 910;

Donnell v. Otts (1921, Ft. Worth—no writ), 230 S.W. 864.

These cases also demonstrate the lack of merit in the contention that the so-called "reservation" estops Respondent. The title conveyed Respondent has no connection with the distinct, independent half otherwise owned by Petitioner. We have demonstrated that it was not carved out of the estate conveyed Respondent. The independent half which Petitioner continued to own was not an estate which would have passed to Respondent by the suit deed but for the so-called "reservation"; nor was it an estate created out of the one-half conveyed to Respondent. Thus the estoppel has no foundation.

By the same token, the holdings in the case of WACO BRIDGE CO. v. CITY OF WACO (1892), 85 Tex. 320, 20 S.W. 137, and GREENE v. WHITE (1941), 137 Tex. 361, 153 S.W. (2d) 575, do not support Petitioner's contention. In the WACO BRIDGE CASE, the Bridge Company held a deed which contained a reservation. The reservation was out of the very estate conveyed, and the court held that the Bridge Company was concluded by the reservation. It was thus a new thing carved out of the thing granted.

In GREENE v. WHITE, supra, the heirs of Alex Garrett sued Mrs. Greene for the title to 133 acres, claiming an adverse possession title. The defendants claimed under a reservation of all minerals in a deed from Greene to Garrett, In this deed Greene purported to convey the 133 acres to Garrett, and reserved all minerals in the 133 acres. The court held the Garrett heirs bound by the reservation. The reservation, however, was carved out of the very estate conveyed, which was not the case here.

In truth, the language relied upon to create a reservation amounted to nothing more or less than a recital on the part of Petitioner that it was conveying to Respondent out of the title owned a full undivided one-half, and that everything owned or claimed by it over, above, and beyond the full un-

divided one-half so conveyed to Respondent was not to be affected by the conveyance. This, as a matter of law, would follow in any event.

It is not thought that Petitioner's contentions based on the so-called "reservation" or "exception" have any substance or vitality.

As to sufficiency of the Circuit Court of Appeals' judgment under the Declaratory Judgment Act.

(Answering Specification of Error Nine, Br. p. 14, Fifth Point, Br. p. 52.)

This contention is specious. Petitioner raised two issues for decision: (1) it sought judgment that the suit instruments conveyed Respondent one-half of only such or whatever title or chance at title Petitioner might have had at the date of the suit instruments, and not the full undivided one-half interest stipulated by the terms of those instruments, and (2) a money judgment of one-half of all moneys which it alleged it had paid to settle the title suit of Thomas v. Southwestern Settlement & Development Company (R. Vol. I, p. 1-24). The trial court sustained Petitioner's contentions on both points. The Honorable Circuit Court of Appeals reversed and rendered (R. Vol. III, p. 1537).

Thus, the adjudication is that the suit instruments conveyed Respondent a full, undivided one-half mineral interest in all lands described and referred to therein (see p. 13 hereof for four classes of references) and adjudicated that Petitioner take nothing by its suit to recover from Respondent one-half the moneys which Petitioner paid to settle the Thomas case.

The adjudication is full and sufficient.

Nothing is advanced to show any lack of sufficiency; in the petition for rehearing the same generalization was advanced, but no specification was furnished calling the at-

tention of the Circuit Court of Appeals to any particulars of lack of sufficiency. In truth, there is no such lack, and the record on its face so shows.

Conclusion

For all of the above reasons, and it appearing that the opinion of the Court of Appeals for the Firth Circuit in reversing and rendering the Trial Court is eminently correct upon reason and authority, it is respectfully submitted that the petition for certiorari should be in all things denied, and it is accordingly so prayed.

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